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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

~~72-~~1553

MARVIN MULLIGAN and MELVIN MARKOWITZ,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FREDERICK B. BELLAMY
Attorney for Petitioners
26600 Telegraph Road
Southfield, Michigan 48076
355-0022

NEIL H. FINK
Of Counsel
3300 Guardian Building
Detroit, Michigan 48226
962-7070

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, by their attorneys Frederick B. Bellamy and Neil H. Fink, pray that a Writ of Certiorari issue to review the judgment heretofore entered against them by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

Petitioners were convicted in the United States District Court for the Eastern District of Michigan, Southern Division, by a jury on March 31, 1972, of one violation of 18 U.S.C. 2314. They filed a timely notice of appeal on June 21, 1972, set forth as Appendix A. On February 15, 1973 the Sixth Circuit Court of Appeals affirmed their convictions via a *per curiam* opinion herein set forth as Appendix B. On April 18, 1973 the Sixth Circuit Court of Appeals denied petitioners' Petition for Rehearing, said order being set forth herein as Appendix C.

2. JURISDICTION

The opinion and judgment of the Sixth Circuit Court of Appeals was entered on February 15, 1973. Rehearing was denied on April 18, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

3. QUESTIONS PRESENTED

The questions presented by your petitioners are: (a) whether the Trial Court committed reversible error by instructing the jury that a reasonable doubt must arise from the evidence presented in court and could not arise from a lack of evidence, thus improperly and affirmatively misdefining "reasonable doubt." *In Re Winship,* 397 US 121 (1970); *Holland v. United States,* 348 US 127 (1954); (b) whether the proofs at trial were sufficient to prove

petitioners' knowledge that the Treasury Bill they were alleged to have possessed was in fact stolen, such knowledge being an essential element of the offense with which your petitioners were charged, 18 U.S.C. 2314; and (c) whether the Trial Court erred in instructing the jury on the inference of knowledge from possession of stolen property, which error created an irrebuttable presumption against your petitioners.

4. STATUTES AND CONSTITUTIONAL PROVISIONS

The constitutional provision involved herein is the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute herein involved is 18 U.S.C. 2314.

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. June 25, 1948, c. 645, 62 Stat. 806; May 24, 1949, c. 139, § 45, 63 Stat. 96; July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub.L. 87-371, § 2, 75 Stat. 802; Sept. 28, 1968, Pub.L. 90-535, 82 Stat. 885.

5. STATEMENT OF THE CASE

This petition concerns a conviction for a violation of Title 18, United States Code, Section 2314. Petitioners were charged in a single-count Indictment with transporting a stolen Treasury Bill in foreign commerce, knowing the same to have been stolen, converted or taken by fraud. The security in question had a maturation value of One Hundred Thousand ($100,000.00) Dollars and reflects the serial number of 1017056A. This bill was one of three thousand other bills taken in a theft from Morgan Guaranty Trust Company of New York, between the dates of the 16th and 20th of October, 1969.

The cause was presided over by the Honorable Thomas P. Thornton, Judge of the United States District Court for the Eastern District of Michigan, Southern Division. Melvin Markowitz filed numerous Pre-Trial Motions including a Motion for Discovery and Inspection, Motion to Suppress Evidence, Motion for Bill of Particulars, Motion to Dismiss the Indictment, Motion in Limine, Motion for Issuance of Subpoena Duces Tecum and Motion for Relief From Prejudicial Joinder. Appellant Marvin Mulligan filed a Motion to Dismiss, Motion for Discovery and Inspection, Motion for Bill of Particulars and Motion for an Order Permitting the Defendant, Mulligan, to Take the Oral Deposition of one Stewart C. Joiner.

Subsequent to the overruling of the Motions, the Petitioners were tried by a jury on March 21, 1972.

The evidence adduced at trial reflects that between the dates of the 16th and 20th of October, 1969, the security in question was taken from the possession of Morgan Guaranty Trust Company along with two hundred ninety-

nine (299) other Treasury Bills of the same general description and tenor (T.73)[1]

The evidence reflects that Petitioner, Markowitz was in possession of the security and attempted to cash the same at the National Bank of Southfield, a suburb of Detroit. Mr. Stewart C. Joiner, Manager of the bank, testified for the Government that, Markowitz brought such a security to the bank to have it cashed (T. 379-381). Mr. Joiner made diligent inquiry as to the status of the bill and determined, by way of the Federal Reserve, that the security was not stolen, and notified Markowitz thereof, but was legally redeemable at its stated maturation value (T. 381). Mr. Joiner testified that he was unable to tender cash for the bill immediately as requested, but that he made an effort to obtain the cash from a correspondent Federal Bank and was subsequently informed that a cashier's check could be issued immediately (T. 380-387). The offer of the cashier's check was refused by Markowitz .

The testimony of Mr. Harry Johnson (T. 417) reflects that on the date of the 17th of February, 1970, that he was a Cost Accountant at the Federal Reserve Bank in Detroit. That he was the manager of the "Treasury Issues Department"; that he received an inquiry from a Mr. Anastasi in February of 1970, regarding a One Hundred Thousand ($100,000.00) Dollar Treasury Bill wherein he wanted to know if it was a genuine bill. Mr. Johnson examined the lists that were available concerning stolen or missing securities. The number that Mr. Anastasi had given to him was genuine and he reported to Mr. Anastasi that it was not reported as stolen. He further testified that subsequently he received another call from Mr. Joiner

[1] "T" refers to pagination in the trial transcript.

concerning said bill and that he had told both Mr. Anastasi and Mr. Joiner that the bill was a genuine bill and that it was not on the list of stolen securities (T. 422). The witness further testified that he did not remember the number of the bill which he checked, and his records did not reflect the particular number of the bill which was introduced into evidence, in that the bill that introduced was numbered, 1017056A, and his records did not contain a security with the designation "A" after the numbers. He testified that he checked the questioned security by a maturity date to the best of his recollection, however, he was uncertain as to the maturity date of the questioned security. He further testified that he was not sure as to the significance of the letter "A" on the security which was introduced in evidence, and further testified that from his knowledge and records that none of the securities stolen from Morgan Guaranty Trust Company had the letter "A" as part of the identification of said securities. The witness further testified that the inquiries made by Mr. Anastasi and Mr. Joiner, together with the information which he furnished to them, could have been the result of a mistake concerning whether the security inquired about was in fact stolen, the witness further testified that he had so stated to the F.B.I. Agents when they had inquired previously (T. 438, 439).

Petitioner Markowitz testified that Xavier Cardenas requested him to cash the bill and not to accept anything but cash (T. 651, 653). Markowitz stated that Cardenas, himself, and one Sidney Solomon had met at Solomon's home to discuss a proposed Three Hundred Million ($300,000,000.00) Dollar loan to the Mexican Government. The loan was to net Thirteen and One-Half (13½%) per cent interest, annual return. At the conclusion of the meeting, Cardenas asked Markowitz if he would cash the bill (T. 645-651).

Xavier Cardenas, the chief witness for the prosecution, partially refuted such an account and testified, concerning the transaction, that he was called by a person named Marvin and was told that if he (Cardenas) had some friends in Mexico who could sell a document, that he could make some money. Cardenas indicated that he was interested and was told to expect a call in a few days (T. 144, 146).

He received another call from Marvin and was told to meet Petitioner Markowitz at Skandia's Restaurant on the outskirts of Detroit (T. 147). Cardenas stated the parties met several times and that ultimately a trip to Mexico was agreed upon to cash the bill (T. 149-157).

Petitioner Markowitz testified that Petitioner Mulligan was to go to Mexico only as a guest (T. 657-659). Markowitz stated that the trip to Mexico was for the sole purpose of securing the appropriate authorization from the Mexican Government so that the loan agreement could be completed (T. 699-700). Testimony by Markowitz reflecting the loan as executed by Cardenas, was introduced in evidence. Cardenas was to use his connections in Mexico City to facilitate the official approval by the Mexican authorities, which allegedly would be easily obtained, and the parties could return to Detroit and report to Solomon. Markowitz's part in the transaction was only to be a courier to obtain the letter of authorization due to the fact that Solomon was ill (T. 699). Markowitz testified that at no time did he or Mulligan see the security after it was returned to Cardenas when cash could not be obtained in Detroit from the National Bank (T. 667). Cardenas' testimony was to the effect that it was on the plane that he first saw the original Treasury Bill (T. 160). He had been furnished a copy of the bill in Detroit three (3) days prior to departure for Mexico.

Cardenas was requested to make reservations for himself, Markowitz and Mulligan. These tickets were paid for on Markowitz's American Express Card. On the night of the 17th day of February, 1970, the parties arrived in Mexico City and proceeded to check into the Hotel Maria Isabel.

The parties were met at the airport by Amdo Moga, Andres Fernandez and David Fernandez, friends of Cardenas, and thereafter the parties proceeded to the hotel to discuss the cashing of the note (T. 161). Markowitz stated that the parties did not discuss the note (T. 672-676).

On February 18, 1970, Cardenas stated that he went to the First City National Bank in Mexico City; the Banco del Atlantico and the Banco del Commerciale, but had no success in finding a willing purchaser (T. 166). The Fernandez brothers were said to have gone to the Hacienda, the Federal Reserve of Mexico, with equal results (T. 164-165).

Cardenas reported back to Markowitz after the morning work. Markowitz, as stated by Cardenas, averred that he had had no success in obtaining the needed authorization and needed more time to accomplish the task (T. 685). Cardenas stated he sought more time due to the fact that he had not been able to secure a transfer agent or purchaser and that he wanted to make his commission on the selling of the bill (T. 167).

On the 19th, Cardenas went to the Banco del Atlantico and met with one Jose Cueto, an architect, for assistance in cashing the security (T. 167, 168). The parties subsequently went to the Banco del Atlantico to meet one Mr. Damiean, a friend of Cueto's (T. 169, 170). Thereafter the parties, not including these Petitioners, called Robert Her-

nandez, a broker who had an office across the street (T. 170, 171). He checked the security with the United States authorities and subsequently discovered it was stolen (T. 172). Cardenas thereupon testified he went to the American Embassy with the security. The American Embassy denied this statement.

The evidence shows that petitioners were deported to Houston where they were arrested by the Federal Bureau of Investigation and released on bond pending trial.

Near the close of the trial in the instant case, the government and both petitioners offered proposed instructions for the jury (3).[2] Petitioners' Requested Instruction No. 3 covered the presumption of innocence, the government's burden of proof and a definition of the phrase "reasonable doubt".[3]

During an in-chambers discussion of the proposed instructions, the Court advised counsel that it would give an instruction on reasonable doubt but not the instruction requested by Petitioners (27-29). Following final argument, the Court charged the jury.[4]

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[2] The references to the transcript in this portion of the statement are to the transcript of March 29, 1972 which was paginated separately by the reporter. Therefore, these references are made simply by page number, unprefaced by the letter "T".

[3] The requested instructions are contained in Appendix D.

[4] (By the Court): ". . . If during the trial the Court has intimated any opinion as to the facts, the jury is not bound by that opinion. The jury alone is the sole and exclusive judge of all of the facts, and *the facts as you probably know are testimony of the witnesses and the evidence that has been admitted as exhibits and whatever you see and hear in the courtroom.*" (135, 136)

(By the Court): "A defendant in a criminal case is presumed by law to be innocent. That presumption remains with him throughout the

(*continued on next page*)

Following the charge to the jury, Petitioners took exception to the charge on "reasonable doubt", specifying the reasons for their objection (150-152).

Additionally, petitioners requested an instruction on "actual knowledge" which was denied by the Court. Thereafter, petitioners objected to the Court's instruction on knowledge.[5]

(continued from preceding page)

trial unless and until he is proven guilty of the crime charged by credible evidence beyond a reasonable doubt.

"Reasonable doubt is a doubt founded in reason arising from the evidence. Not a mere hesitation of the mind to pronounce guilt because of the punishment that may follow. Not a mere capricious doubt or a hesitancy of the mind to say this man did so-and-so, but it must be a doubt founded in reason and arising from the evidence." (137, 138)

"As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a Defendant or Defendants, the jury be satisfied of a Defendant's guilt beyond a reasonable doubt from all of the evidence in the case." (134)

"Generally speaking, you should use your good common sense here, ladies and gentlemen, just as you would in acting upon the most vital and important matters pertaining to your own affairs. Resolve the facts in this case according to calm, deliberate and cautious judgment, in the light of your own knowledge of the natural tendencies and propensities of human beings" (147)

[5] "Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen, and possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance which the jury may reasonably draw the inference and find in light of surrounding circumstances shown by the evidence in the case that the person in possession not only knew it was stolen property but also participated in some way in the theft of the property.

Ordinarily, the same inferences may reasonably be drawn from a false explanation of possession of recently stolen property. The term 'recently' is a relative term, and has no fixed meaning. Whether prop-

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Petitioners objected specifically due to the failure of the Court to give an instruction on actual knowledge (152) and objected further, to the Court's failure to instruct the jury as to the effect of the good faith effort on the part of the Petitioners to determine whether the security was stolen and to apply such instruction to the facts of this case. Objections further point out to the Court (153) that the Court failed to instruct the jury that an inference cannot stand in the face of direct evidence and that no inference can be drawn contrary to direct evidence. That the Court was denying Petitioners a charge on the elements of the offense and that it was error to give an instruction on the application of inference as a substitute for evidence

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erty may be considered as recently stolen depends on the nature of the property and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may be drawn from unexplained possession.

If you find beyond a reasonable doubt from the evidence in the case that the United States Treasury Bill described in the Indictment was stolen, and that while recently stolen the property was in the possession of the accused, you may from these facts draw the inference that the United States Treasury Bill was possessed by the accused with knowledge that the property was stolen.

In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights, the accused need not take the witness stand and testify. There may be opportunities to explain possession by showing other facts and circumstances independent of the testimony of the Defendant or Defendants. You always bear in mind that the law never imposes upon a Defendant in a criminal case the burden of calling any witnesses or producing any evidence. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits you to draw from possession of recently stolen property. If any possession the accused may have had of recently stolen property is consistent with innocence or if you entertain reasonable doubt of guilt, you must acquit the accused."

under the facts of this case (153). That the Court failed to instruct the jury as to the inference to be drawn by the jury considering the good faith effort on the part of Petitioners to discover from the Federal authorities the status of the security prior to the foreign transportation, if any, of the security (154). The Petitioners further objected to the instruction on constructive possession and inference, for the reason that such instruction would require the explanation on the part of these Petitioners of the possession of the Government witness, Cardenas, and further, created an irrebuttable presumption against the Petitioners (154). The Court refused to give further clarifying instructions.

Thereafter, at approximately 2:55 p.m., on Thursday, March 30, 1972, the jury began its deliberations. At 4:20 p.m. that day they were excused and commanded to return at 9:30 a.m. the next morning, Friday, March 31, 1972 (Good Friday).

At 9:50 a.m. on Friday, the Court reconvened to discuss a request by the jury for the Judge's instructions to them. A discussion followed as to the appropriateness of this request in light of Petitioners, objections to the instructions (161), and if the request were to be honored, whether the charge was to be repeated orally or given in writing to the jurors.

The instructions were supplied to the jury.

The jury returned verdicts of guilty as charged as to both petitioners (166, 167).

6. REASONS FOR GRANTING THE WRIT

Petitioners assert that one good reason for granting a Writ of Certiorari in this case is that the Sixth Circuit Court of Appeals has "departed from the accepted and usual course of judicial proceedings" (United States Supreme Court Rule 19) in that it failed to adequately state the reasons for affirming petitioners' convictions. Petitioners objected to the absolute lack of reasoning in that Court's order affirming the convictions (Appendix B) via a Petition for Rehearing (Appendix E). Yet, the Sixth Circuit refused rehearing and further refused to clarify its earlier opinion. In effect, the Court of Appeals has "passed the buck" to this Court. Had it not done so, perhaps the burden on this Honorable Court's docket would be less, at least by one Petition for Certiorari.

(a)

The Sixth Circuit was presented in this case with three issues. Each involved a conflict between the rulings of the Trial Court and the rulings of this Court, other federal courts and controlling state decisions. The first issue presented to the Court of Appeals revolved around the Trial Court's inadequate and misleading instructions to the jury on the subject of guilt beyond a reasonable doubt. In *In Re Winship, supra,* this Court stated for the first time that the burden of proof in a criminal case, proof beyond a reasonable doubt, was part and parcel of an accused's right to due process of law pursuant to the Fourteenth Amendment of the United States Constitution. The thrust of petitioners' argument was that the Trial Court failed

to adequately safeguard this important due process right of petitioners.

It must be noted that petitioners proposed in writing an instruction as to reasonable doubt and a definition thereof. They objected to the Court's charge to the jury and gave a complete explanation for their objection. Furthermore, they renewed their objections when the jury requested a copy of the instructions and again via a motion for a new trial or arrest of judgment. The motion for a new trial included the following allegation of error:

> "This Honorable Court committed error by refusing the defense's request to charge on the definition of 'reasonable doubt' and further compounded said error by giving a wholly inadequate definition of 'reasonable doubt'."

A Brief supporting the motion was also filed and oral argument heard by the Court.

The general rule as to instructions in a criminal case dealing with proof of a defendant's guilt beyond a reasonable doubt is stated in 53 Am Jur, *Trials*, §§ 747 to 756 (citations omitted):

> "In criminal cases the burden of proof is upon the state to establish beyond a reasonable doubt that the accused is guilty of the crime charged in the indictment, and the court must so charge the jury . . . "
>
> "In a criminal case, the jury must be instructed that the crime must be proved beyond a reasonable doubt, otherwise the accused must be acquitted; its failure or refusal to do so will ordinarily constitute reversible error. The defendant is entitled to such an instruction in every case . . . "

" . . . in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension. Indeed, there are express holdings that a defendant is entitled to have the jury instructed as to what a reasonable doubt is."

"In defining reasonable doubt, no set formula is required. While it has been suggested that it would be best for trial courts to adhere to forms of definitions which have been approved by reviewing courts, and that they should avoid the use of expressions which have been disapproved, even though they may not have been regarded as sufficient cause for reversal . . . "

"*The jury may be told that reasonable doubt which may arise must come from the evidence or from a want of evidence, that is, from a want of evidence offered by the people.* It has been declared that instructions on the subject should be so framed as to make it clear to the jury that the doubt may arise from the absence of evidence and from the evidence introduced, and that it is error to give an instruction which limits the doubt to something suggested by or arising from the evidence adduced. . . . An instruction that a doubt arising from a desire for more evidence of guilt is not a reasonable doubt is erroneous, because a doubt of guilt would be reasonable if the jury felt that there was an entire absence of evidence on a vital element in the case."

"Many courts have criticized as misleading and erroneous instructions defining 'reasonable doubt' as a doubt for which there is some good reason arising out of the evidence or lack of evidence, or as a doubt for which a reason can be given or for which the jury can give a reason, some courts even holding that such instructions constitute cause for reversal. The latter statement especially has been criticized because, among other things, it puts upon

the defendant the burden of furnishing each juror a reason why he is not satisfied of guilt with the requisite certainty, and because it fails to specify the kind of reason meant."

> " . . . *courts have approved instructions containing the statements that a reasonable doubt is such a doubt as would cause a reasonable doubt, prudent, and considerate person to pause and hesitate to take action concerning matters affecting his own material interests or matters pertaining to the more important matters of life, and that a reasonable doubt is excluded where the jurors are so convinced by the evidence of the defendant's guilt that as prudent men they would feel safe to act upon the conviction in matters of highest concern and importance to their own dearest and most important interests, under circumstances where there is no compulsion upon them to act at all.*" (emphasis added)

Thus, the law is clear that, upon request, a defendant is entitled to have a definition of "reasonable doubt" included in the charge to the jury.

Petitioners urge that once the Court agreed to include a definition of "reasonable doubt" in the charge to the jury, it was bound to do so. Moreover, the Court was obligated to insure that the definition given was an accurate one. The Court charged:

> "Reasonable doubt is a doubt founded in reason arising from the evidence. Not a mere hesitation of the mind to pronounce guilt because of the punishment that may follow. Not a mere capricious doubt or a hesitancy of the mind to say this man did so-and-so, but it must be a doubt founded in reason and arising from the evidence."

This is totally inadequate.

The concept of "reasonable doubt" and its expression in jury instructions has been the subject of much judicial expression.[6]

The suggested instruction on "reasonable doubt" in Devitt and Blackmar, *Federal Jury Practice and Instructions, West,* 1970 at § 11.01 is:

> "The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a 'clean slate'—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.
>
> "It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

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[6] *Holland* v *United States*, 348 US 121, 140, 75 S Ct 127, 99 L Ed 150 (1954); *Dunbar* v *United States*, 156 US 185, 199, 15 S Ct 325, 39 L Ed 390 (1895); *Holt* v *United States*, 218 US 245, 254, 31 S Ct 2, 54 L Ed 1021 (1910); *Jones* v *United States*, 338 F2d 553, 555 (DC Cir 1964); *United States* v *Senior*, 274 F2d 613, 617 (7th Cir 1960); *United States* v *DiDonato*, 301 F2d 383, 385 (2 Cir 1962); *United States* v *General Motors Corp*, 216 F Supp 362, 364 (SD Cal 1963); *Bernstein* v *United States*, 234 F2d 475, 487 (5th Cir 1956); *Jones* v *United States*, 113 US App DC 233, 307 F2d 190 (DC Cir 1962); *Billeci* v *United States*, 87 US App DC 274, 184 F2d 394, 399, 24 ALR 2d 881 (DC Cir 1950).

> "The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.
>
> "The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.
>
> "A reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge. So, if the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should of course adopt the conclusion of innocence."

The leading case in the area of instructions on reasonable doubt in *Holland* v *United States, supra.* Therein the Supreme Court stated that the charge on reasonable doubt

> " . . . should have been in terms of the kind of doubt that would make a person hesitate to act, see *Bishop* v *United States*, 71 App. D.C. 132, 107 F.2d 297, 303, rather than the kind on which he would be willing to act."

Most recently in *United States* v *Cole,* 453 F2d 902, 906 (8 Cir 1972), the Court agreed with the Holland proposition:

> "We agree that the definition of reasonable doubt should be phrased in terms of hesitation to act . . ."

The Cole Court found no reversible error as to the instructions because defendant's attorney failed to clearly state his objections at trial to the definition as given. In

the instant case, counsel protected the record in every way possible.

In *United States* v *Quinn,* 315 F2d 425 (4 Cir 1963), Judge Bryan held that in the absence of a request for a definition of "reasonable doubt", failure to so define was not plain error. There, defendant's counsel did not take exception at the appropriate time to the charge on reasonable doubt.

> "While some further exposition by the Court of 'reasonable doubt' might have been given, *Williams* v *U.S.,* 271 F.2d 703, 705 (4 Cir. 1959) we are unwilling to say the failure to do so *when not requested* was error." (emphasis supplied)

The clear import of this language is that had defendant requested a definition and the Court refused to give one, reversal would be required. In the instant case, defendant requested, at least twice, a proper and accurate definition of reasonable doubt. The Trial Court did not give such an instruction. *Quinn, supra,* requires that defendant be given a new trial.

Petitioners contend that their Requested Instruction No. 3 was a proper instruction on "reasonable doubt." In *Holt, supra,* the Court held adequate the lengthy instruction defining "reasonable doubt", which stressed that it must be such as a "reasonable person" might entertain "acting in a matter of great importance in his personal affairs." The instruction also characterized the doubt as "substantial" and "actual", rather than a "mere possibility."

In *Senior, supra,* the approved instruction stated:

> "If after considering all of the evidence in the case, you have such a doubt in your mind as would cause you, or any other reasonably prudent person,

> to pause or hesitate before acting in a grave transaction of your own life, then you have such a doubt as the law contemplates as a 'reasonable doubt'." (p. 617)

In *Bernstein, supra,* the approved instruction on reasonable doubt emphasized that it was not a "speculative doubt" but a doubt "for which a reasonable man can give a reason." Similarly, in *Freeman* v *United States,* 158 F2d 891, 896 (9 Cir 1947), the court noted that the expression "doubt based on reason" was frequently employed by courts. Cf. *United States* v *Davis,* 328 F2d 864, 867 (2 Cir 1964) where instruction was criticized.

The Court should more properly have instructed the jury that, "A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence" as requested by petitioners. Throughout the instructions, the Court emphasized that the facts upon which the jury was to base its decision were "testimony of witnesses and the evidence that has been admitted as exhibits and whatever you see and hear in the courtroom" (135, 136); that reasonable doubt must be determined "from all of the evidence in the case" (143); and that a reasonable doubt is one "arising from the evidence" (138).

The Court had previously agreed to give such a charge (27-28). Failure to give the instruction upon request is prejudicial and reversible error.

The general rule regarding a lack of evidence as a predicate for a reasonable doubt is stated in CJS *Criminal Law,* § 910:

> "In a reasonable prosecution a reasonable doubt can be created by many things, but to be sufficient to prevent a conviction it must arise from the evidence adduced, or from the lack of evidence and

> can arise from no other legitimate source. . . . Accused in entitled to benefit of any doubt arising from lack of evidence."

Further, at CJS *Criminal Law*, § 1283, it is stated:

> "It is essential to an adequate instruction on the subject of reasonable doubt that the jury be advised as to the effect of the lack of evidence. Accordingly, it is proper to charge and error to refuse to charge, that a reasonable doubt may arise either from the evidence or from a want of evidence."

Appellate courts at both the state and federal levels have had occasion to deal with the instant question. The connecting thread among these decisions seems to be that the various appellants' trial attorneys rarely, if ever sufficiently protected the record by (1) proposing written instructions to the jury; (2) objecting when the Court refused to give their proposed instructions; (3) objecting after the Court has charged the jury; and (4) objecting through a motion for a new trial. However, in the instant case, counsel for each appellant strenuously voiced vigorous exceptions at each of the four aforementioned times. If the cases to be discussed below rest on the proposition that the record at trial was insufficiently protected, then the instant case is distinguishable. Since the record herein was properly protected, this Honorable Court must reverse the appellants' convictions and remand for a new trial.

In *United States* v *Rinaldi*, 301 F2d 576 (2 Cir 1962), the appellant claimed that the Trial Court committed "plain error" in misinforming the jury as to what the phrase "beyond a reasonable doubt" meant. The Court stated:

> "In four instances defendant's claim plain error in the charge: . . . (2) That reasonable doubt must

> arise out of something tangible in the evidence, . . . Taken as a whole, the charge is plainly sufficient. If the language in the portions attached taken out of context, is in any way open to criticism, it could have been corrected had criticism of it been called to the attention of the court, or exception taken. Where no exception is taken, we will not consider alleged errors in the charge unless substantial prejudice resulted. . . . The reference to tangible evidence as a basis of reasonable doubt would be questionable in the abstract, but here it was obviously used as an antonym of emotion, whim, fancy or caprice and so used was correct."

In *Rinaldi*, trial counsel failed to adequately protect his record via specific and timely exceptions. The Court in *Rinaldi* required that timely exceptions be made as a criterion for reversal. Specifically, that Court did not approve of the reference to tangible evidence without reference to a lack of evidence. It was only because of the fact that a timely exception had not been taken that the Court did not reverse appellant Rinaldi's conviction.

In defining the government's burden to prove a defendant's guilt beyond a reasonable doubt, the Court in *Laughlin* v *United States*, 385 F2d 287, *cert den*, 390 US 1003 (DC Cir 1968), held that:

> " . . . in a case where some lack of evidence for the government fairly creates a reasonable doubt of guilt we may expect a normally intelligent jury to perceive that fact after comparison and consideration of all the evidence. See *People* v *Radcliffe*, 232 N.Y. 249, 133, N.E. 577 (1921). But we need not declare that in all cases it would be correct to refuse a tendered instruction like the appellant's here. For here the appelants have made no attempt to show prejudice, and after reading the entire trial transcript we can see none."

In *Laughlin, supra,* the Trial Court had charged the jury as follows:

> "A reasonable doubt is one which is reasonable in view of all the evidence. Therefore if after an impartial comparison and consideration of all the evidence you can candidly say that you have such a doubt as would cause you to hesitate to act in matters of importance to yourselves, then you have a reasonable doubt. But if after such impartial comparison and consideration of all the evidence and giving due consideration to the presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would not hesitate to act upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt."

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> "To be sure [has] on occasion defined reasonable doubt as 'a doubt arising from the evidence or from a lack of evidence, after consideration of all the evidence.' *E.g. Bishop* v *U.S.,* 71 U.S. App. D.C. 132, 107 F.2d 298 (1939)".

Laughlin, supra.

A recent case in the Michigan Court of Appeals, *People* v *Davies,* 34 Mich App 19 (1971), held that it was error for the trial judge to charge the jury that a reasonable doubt may not be based on a lack or want of evidence or on the unsatisfactory nature of the evidence. Instead, the Court suggests, the correct instruction should be that a reasonable doubt may arise not only from the evidence but from a lack of it. Admittedly, the main distinction between *Davies* and the instant case is that in the former the trial judge instructed incorrectly while in the latter the trial judge failed to instruct correctly.

Petitioners contend that the Court's instructions to the jury were phrased in such a manner that it was not even implied that the jury could look for a lack of evidence. The phrase "the evidence in this case" appears frequently throughout the entire charge. Had the idea that a reasonable doubt may arise from a want of evidence been strongly implied by the Trial Court, this would not be error. See *Miller* v *State*, 225 So 2d 409 (Fla 1969).

In *State* v *Walker*, 166 A2d 567 (NJ 1960), a homicide prosecution, the defendant proposed that the Trial Court instruct the jury with a definition of "a reasonable doubt". His requested instruction contained the same language which petitioners herein claim it was error to omit. The *Walker* Court held that the Trial Court committed reversible and prejudicial error during the charge to the jury by not directly expressing or implying that a reasonable doubt might arise from insufficient evidence. See also *State* v *Driver*, 183 A2d 655 (NJ 1962).

In *State* v *Parkin*, 230 Iowa 991, 299 NW 917 (Iowa 1941), the Court held that even in a prosecution for drunken driving it is absolutely essential to an adequate instruction on the subject of reasonable doubt that the jury be charged as to the effects of a lack or want of state's evidence. An instruction which merely defines reasonable doubt to be that doubt which is based upon all facts and circumstances shown in the evidence constitutes reversible and highly prejudicial error as it fails to explain that a reasonable doubt may in fact be predicated upon a lack or want of evidence.[7]

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[7] Accord, *State* v *King*, 232 Iowa 16, 4 NW 2d 255 (Iowa 1942); *State* v *Tennant*, 204 Iowa 130, 214 NW 708 (1927); *State* v *Anderson*, 209 Iowa 510, 228 NW 353, 67 ALR 1366 (1930); *State* v *Gratton*, 218 Iowa 889, 256 NW 273 (1934). See also, *Knight* v *State*, 23 Ala App 582, 129 So 478 (1930); *Stafford* v *State*, 33 Ala App 163, 31 So 2d 146 (Ala 1947); *Spreitzer* v *State*, 50 NW 2d 516 (Neb 1951).

Compounding the error already discussed is the fact that the jury, late in its deliberations (in fact, only 1½ hours before returning a verdict), requested a copy of the judge's instructions. This can show only that the jury relied on the erroneous charge in reaching its verdict. Thus, the charge to the jury can in no way be construed as harmless error. Reliance on the instructions could only have further prejudiced the jury against the petitioners.

The concept of proof beyond a reasonable doubt is a cornerstone of the American Criminal Justice System. "Reasonable doubt" as a standard of proof has been expressly incorporated into the Due Process Clause of the Fourteenth Amendment. *In Re Winship,* 397 US 357, 25 L ed 2d 368, 90 S Ct 1068 (1970). See, also *Ballew* v *Sarver,* 320 F. Supp 1233 (DC Ark 1970); *United States ex rel. Travis* v *Travis,* 319 F Supp 380 (DC WVa 1970). In *Winship* the Court considered

> " . . . the ringle, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." (footnote omitted)

The Court's answer:

> "Lest there remain any doubt about the constitutional standard of the reasonable-doubt standard, we explicitly hold that Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

In *Winship, supra,* at 361, Mr. Justice Brennan, writing for the Court, went to great pains to discuss the development and meaning of the concept of proof beyond a reasonable doubt. He concluded that

> *The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criimnal law."*

In view of the record, petitioners urge that the error herein discussed should not be deemed harmless.

Xavier Cardenas, who, if believed, would be a self-admitted accomplice to the crime charged, was the government's key witness upon whom the government's case rested.

Petitioner Markowitz testified in his own behalf. His testimony tends to contradict that of Cardenas in every material aspect. It was a classic situation of oath against oath. These petitioners found themselves in the not so unusual position of relying upon the salutory protection of the concept of reasonable doubt. Said protection was stripped of its meaning by a totally inadequate instruction.

(b)

The second issue which the Court of Appeals failed to face dealt with the sufficiency of the evidence on the element of knowledge. 18 U.S.C. 2314. The facts relevant to this issue are set forth in the statements of the case, *infra*.

The essential elements of the offense proscribed by Title 18, United States Code, Section 2314 are as follows:

(1) that the security in question was stolen, converted or obtained by fraud;

(2) the Defendant transported it or caused it to be transported in foreign commerce;

(3) at the time the Defendants transported it or caused it to be transported in foreign commerce they had knowledge that it was stolen, converted or obtained by fraud;

(4) that the property was of the value of Five Thousand ($5,000.00) Dollars or more; *United States* v *Kierschke,* 315 F. 2d 315, (6th Cir., 1963); *Pereira* v *United States,* 347 U.S. 1, 74 S Ct 358 (1954).

The Supreme Court of the United States in *Morissette* v *United States,* 342 U.S. 246, 96 L. ed. 288, (1951), considered a question fundamental to this appeal. In the *Morissette* case there was a conviction under Title 18, United States Code, Section 641, which construed a statute similar to Section 2314. In the *Morissette* case the Defendant was convicted of removing scrap iron from a bombing range which admittedly belonged to the Government. The only defense advanced in the *Morissette* case was the fact that he was of the opinion that the scrap iron was abandoned by the Government and consequently he loaded three (3) tons on his truck, removed it from the Government Reservation in broad daylight and sold the scrap iron for Eighty Four ($84.00) Dollars. He was charged with having unlawfully, willfully and knowingly stolen and converted property of the United States of the value of Eighty-four ($84.00) Dollars. He was convicted, sentenced to imprisonment for two (2) months or to pay a fine of Two Hundred ($200.00) Dollars. His case was affirmed by the Court of Appeals for the Sixth Circuit, one Judge dissenting; *Morissette* v *United States,* 187 F. 2d 427. The Supreme Court granted *certiorari* and reversed.

The testimony of Morissette and the circumstances were analogous to the instant circumstances. He testified that he did not intend to steal the property; he had no wrongful or criminal intent. The Court instructed the jury in the

Morissette case much as the Court did in the instant case. The trial court held that proof of intent was not a necessary element of the offense, just as the trial court held in the instant case, that the Government did not have to prove actual knowledge nor intent, but only had to prove that the subject matter, to-wit: the cast iron in *Morissette* and the Treasury Bill in the instant case was tranported, or more properly, that asportation had been effected. There had been a removal of the chattel in a manner to invoke the Federal jurisdiction.

The Supreme Court in *Morissette* discusses those offenses which have eliminated *mens rea* as an element. The Court in a well reasoned opinion sets forth guiding principles of the common law, and in particular, the common law crimes which were adopted by the States and ultimately, the Federal Congress. The Court further reasoned that the Courts have unanimously adopted the central rationale that the wrong-doer must be conscious to be criminal and is emphasized by the variety, disparity and confusions of their definitions of the requisite by elusive mental element. That crime as a compound concept generally in our jurisprudence is constituted from concurrence of an evil meaning mind with an evil doing hand, and this philosophy took deep and early root in the American soil.

Morissette v *United States*, 342 U.S. 252, Footnote 9:

> "Even a dog distinguishes between being stumbled over and being kicked."

The Court discusses the history and the rationale of that category of crime requiring no mental element as an ingredient of the crime but is concerned only with forbidden acts or omissions. Generally, the absolute liability doctrine established in civil law and to some extent in criminal law

is reserved to such activities as dispensing of impure foods or such inoffensive crimes as traffic violations. The Court also carefully excerpts from strict or absolute liability matters involving common law larceny. The Court reasoned that stealing, larceny and its variants and equivalents were among the earliest offenses known to law existing before legislation; they are invasions of right of property which stir a sense of insecurity in the whole community and arouses public demand for retribution. The penalty is high and when a sufficient amount is involved the infamy is that of a felony which is . . . as bad a word as you can give a man or thing. The Court further reasoned that the State Courts have consistently required proof of intent in larceny type offenses, and further that the mere omission by Congress in the enactment of Section 641, which is comparable to the instant statute, does not warrant the Courts to create an offense new to the general law, for whose definition the Courts have no guidance except the act. The Court cites many cases to support the proposition that actual knowledge is an ingredient of any crime involving the concept of common law larceny.

The Government in *Morissette* advanced the identical argument as the Government in the trial court, to-wit: it radically changes the weights and balances in the scales of justice by eliminating the proof of the element of knowledge and intent. The Supreme Court held that common law crimes involving larceny, theft, and similar anti-social conduct requires the concurrence of intent and the act or omission, and further held that when Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice it presumably knows and adopts the cluster of ideas of each borrowed word in the body of learning from which it was taken, and the meaning its use will convey to the judicial mind unless

otherwise instructed. In such cases, absence of contrary direction may be taken as satisfaction with widely accepted definitions not as a departure from them. "We hold that mere omission from Section 641 of any mention of intent will not be construed as eliminating that element from the crime denounced." The Government argued that the mental element of intent which is analogous to "knowledge" in Section 2314 is not necessary, and that good faith, and the showing of an absence of the necessary mental element is not a defense to an offense involving the common law offense of larceny. The Supreme Court carefully and meticulously reviewed the history of the Federal authority, as well as the constituent elements of the offense and held that the elements of common law larceny, which is the basis of Section 2314, can be described in terms of civil as well as criminal liability. That while all theft is of necessity a conversion, all conversions are not necessarily thefts. That conversion may be consummated without any intent to keep and without any wrongful taking where the initial possession by the converter was entirely lawful and conversion may include misuse or abuse of property; however, for conversion to amount to theft there must be the requisite intent and knowledge in order for the conversion to amount to criminal as distinguished from civil liability.

The Supreme Court further discussed the question of the instructions to the jury concerning criminal intent, as well as presumptions in the *Morissette* case. The Supreme Court held that the instructions of the Court below in essence amounted to an instruction of a finding of guilty against the accused. These instructions were less burdensome than the instructions given by the trial court in this case.

The sufficiency of evidence is discussed in the case of *Rodgers* v *United States,* 402 F. 2d 830, (9th Cir., 1968).

The Ninth Circuit was not hesitant to point out that the Government has a heavy burden of proof in a criminal case, while the Defendant has none. However, it was noted that the statutory inferences created by Section 2314, arising from possession, relieve the Government of much of that burden. It is suggested as a practical matter, inferences do in fact shift the burden of proof, despite the attempt of instructions to defeat this effect. If an inference is to be permitted, a jury can say only that it is more probable than not that a given element of the crime exists—however, it cannot say that a given element exists beyond a reasonable doubt. But there is one essential step that is rarely mentioned that must be scrutinized in this case and that is, the Government must lay a *necessary predicate* before resorting to the use of the statutory inference. In other words, the case must be decided on sufficient evidence; that is evidence to support a verdict and if by chance the evidence is insufficient, the jury should not be permitted to draw the inference or return a verdict for that violation in question.

Such was the situation in *Rodgers, supra*, where the Government's case included an "explanation" of the Defendant's possession of the stolen goods. The Government failed to counteract the effect of its own evidence and guilty knowledge could not be proven or inferred on the insufficiency of the evidence. The Court aptly states the rule to be utilized:

> "Therefore, when the Government's case includes an 'explanation', the apparent validity of which is not offset by any substantial evidence, we think the government is no longer entitled to the inferences —it has not really met its heavy burden of proof." *Id.* at 834.

The same situation has occurred in the instant case as is illustrated in the prefatory statement to the Specification

of Error. The *Rodgers* decision reaffirms one long standing rule and that is, the Court will carefully scrutinize the evidence brought forward to convict due to the fact that the Petitioners have the right to have all elements of the violation proven beyond a reasonable doubt. *Christoffer* v *United States*, 338 U.S. 84, 89, (1949). The Specification of Error can be recapitulated to this point by the requirement that the prosecution's case may not be sent to the jury unless evidence is produced sufficient to permit a finding on each element beyond a reasonable doubt. This is where the District Court herein committed error.

The logical conclusion in *Rodgers*, as in the instant case, is that the Government can only be permitted to draw the inferences allowed by the statute if the Defendant's possession is not satisfactorily explained. Therefore, if the Government elicits testimonial evidence that explains the Defendant's possession and such is not shown to be guilty possession, but *innocent possession*, then the inference should not be allowed for the reason that the Government is guilty of a *contradiction* going to an essential element of its case.

As was pointed out in *United States* v *Carey*, 428 F. 2d 229 (5th Cir., 1970), evidence relied on as proof of possession must be scrutinized with due care to prevent injustice. Further, in circumstantial evidence cases, such as the instant case, inferences to be drawn from the evidence presented must not only be *consistent* with guilt, but *inconsistent* with every reasonable hypothesis of innocence. At this point one need only inquire rhetorically as to whether or not the elicitations by the Government attorneys from Mr. Joiner and Mr. Johnson were consistent with guilt or whether the direct contradiction, aforementioned, imposed by the Government upon itself by these questions rendered the evidence insufficient to support a finding as to know-

ledge? The only logical conclusion is that since the Government "explained" the possession by the Appellant, Markowitz, no inference was rightfully before the jury, for the Government made no subsequent effort to put forth *substantial* evidence to rebut that explanation contradictory to their case.

As pointed out in *Casey* v *United States*, 276 U.S. 413, (1928), the test in determining the sufficiency or insufficiency of the evidence is whether a reasonable minded jury could accept the evidence as adequate and sufficient to support the conclusion of the Defendant's guilt beyond a reasonable doubt. But this is not to say that any jury could be reasonably minded when insufficient evidence is allowed to go before the jury. The Court has the duty to first determine the adequacy of proof or substantial justice will not be done.

Substantial evidence means relevant probative evidence which a reasonable mind would accept as adequate to support the conclusion. *United States* v *Delay*, 440 F 2d 566, (7th Cir., 1971). Can it be said in the instant case that there is substantial evidence rebutting the Appellant Markowitz's good faith inquiry as shown by the Government? Can it be said that the Appellant, Markowitz, showed indicia of guilty knowledge?

The answers to these crucial questions are in the case of *Pauldino* v *United States*, 379 F. 2d 170, 172, (10th Cir., 1967), where the Court aptly and appropriately stated:

> "Where the evidence as to an element of a crime is equally consistent with a theory of innocence as with a theory of guilt, that evidence fails to establish guilt beyond a reasonable doubt." 379 F. 2d at 172.

So, the crucial inquiry becomes one of whether the inference as to Petitioner Markowitz's innocent possession

is as reasonable as an inference that he had guilty knowledge. It is apparent that the Government relied upon the presumption or inference found in 18 U.S.C. 2314. The Government and the Trial Court were in error in relying upon and utilizing said inference as to knowledge for the reason that such inference creates an irrebuttable presumption and thus constitutes a shifting of the burden of proof to the Petitioners which is a violation of procedural and substantive due process. The result of the Court's instructions on inferences will be discussed herein as the law applicable to presumptions and inferences due to the result of the Court's instructions as there is no distinction between inference as the Court below used the term and the law of presumptions, and therefore, both will be hereinafter discussed under the general term of presumptions.

Presumptions and inferences, as used below, may be classified according to several different sets of criteria. First, in its evidentiary effect, a presumption may be conclusive, mandatory or permissive. A conclusive presumption has the effect of foreclosing argument on an issue, once certain facts have been proven. The proven facts may be disputed, but their effect in creating the presumed fact may not. See *Vega Steamship Company* v *Consolidated Elevator Company*, 308 N.W. 973. See also J. Mayer, *Preliminary Treatise on Evidence at the Common Law*, 313, 352; Wigmore, *Evidence*, Section 2490; Bohlen, *The Effect of Rebuttable Presumption of Law Upon the Burden of Proof*, 68 U. Pa. L. Rev., 307.

A mandatory presumption has the effect of *forcing* the jury to find the presumed fact if the proved fact is believed and no evidence rebutting the presumed fact is produced by the opposing party. However, the presumed fact may be disputed and need not be found by the jury if evidence

is introduced to rebut it. The permissive presumption *allows* the jury to find the presumed fact from the facts proven, but it does not require such a finding. Both presumptions were discussed in *Leary* v *United States*, 395 U.S. 6, (1969), and determined to be permissive, as are all presumptions involving elements of a crime in criminal prosecutions.

Second, presumptions may be classified according to whether they shift the burden of producing evidence, the burden of persuasion, or both. Third, different levels of prof may be required to rebut different presumptions. Depending on the presumption, the Court may require that some evidence, believable evidence, substantial evidence, evidence sufficient to support a finding or a preponderance of evidence be introduced before a presumption against a party will have been rebutted. See Stumbo, *Presumptions —A View at Chaos*, 3 Washburn Law Journal 182. See also Note, *Constitutionality of Rebuttable Statutory Criminal Presumptions*, 34 University of Chicago Law Review 141.

There are certain limitations upon the use of presumptions in criminal law due to the constitutional principles involved therein. To allow a conclusive or mandatory presumption against a criminal defendant on an element of the crime would infringe his right to be free from a directed verdict for the prosecution. The jury must always be permitted to determine whether there is a reasonable doubt as to each element in a criminal case. Conclusive or mandatory presumption as to the elements of the crime would have the effect of granting the prosecution a directed verdict on that element in violation of the principle; *Morissette* v *United States*, 342 U.S. 246, (1952).

With respect to elements of a crime, at most, only permissive presumptions are allowed. A presumption that

shifts the burden to the defendant to disprove an element of the crime may not be used in a criminal case. The burden of persuasion must always rest on the prosecution; *Lilienthal* v *United States*, 97 U.S. 237, (1878); *Leland* v *Oregon*, 343 U.S. 790, (1952); and therefore, the effect of a presumption against the defendant must be limited to shifting the burden or coming forth with the evidence.

Even if it is agreed that permissive presumptions are allowable only in criminal actions, the fact that the burden of proof must always rest upon the Government may invalidate presumptions within this permitted class; *Mobile, Jackson & Kansas City Ry.* v *Turnipseed*, 219 U.S. 35, (1910). The Supreme Court in *Turnipseed* stated:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of the due process of law or a denial of the equal protection of the law, it is only esential that there shall be some *rational connection* between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so *unreasonable* as to be a purely arbitrary mandate." 219 U.S. 35, 43.

Although *Turnipseed* was a civil proceeding, its test was partially adopted by *Yee Hem* v *United States*, 268 U.S. 178, (1925).

The first criminal case, of any consequential importance, dealing squarely with the adequacy of inferences was *Tot* v *United States*, 319 U.S. 463, (1943). There the Supreme Court struck down the presumption created by Section 2 (f) of the Federal Firearms Act declaring that the inference drawn was inconsistent with due process, there being no rational connection between the facts proved and the ultimate facts presumed.

The Government alleged in *Tot* that the Court should adopt an alternative test, in that the "comparative convenience" or producing evidence of the ultimate fact should control. Under this test, a presumption is valid which seeks to have the opponent come forward with facts accessible to him but not to the proponent, while if the facts are not accessible to the opponent their accessibility to the proponent will not validate the presumption. This type of test was used in *Yee Hem, supra, Morrison* v *California*, 291 U.S. 83, (1934), and *Casey* v *United States, supra.* Despite this earlier authority, the Supreme Court rejected the "comparative convenience" test and followed the "rational connection test" in determining whether or not a statutory presumption is valid under constitutional principles.

The Court likewise pointed out that the only sufficient way a Defendant could rebut an inference of this type would be to take the stand in his own defense and that would require something contra to his constitutional rights. This type of burden is too heavy for the individual defendant and where the inference is so strained as not to have a reasonable relation to the circumstances of life as experienced by reasonable men it is not competent for the legislature to create it as a rule governing the procedure of Courts. That is to say, that the inference of the one fact from the proof of the other must illustrate a connection resulting from common experience. See *Bailey* v *Alabama*, 219 U.S. 218, 219, (1911); *Luria* v *United States*, 231 U.S. 9, (1913); and *Morrison* v *California, supra.*

The "rational connection" test was further reaffirmed by the Supreme Court in *United States* v *Gainey*, 380 U.S. 63, (1965). The Court held that the inference authorized by Title 26, United States Code, Section 5601 (b) (2), which provides that an accused's unexplained presence at the site where and when the business of a distiller is car-

ried on without bond "shall be deemed sufficient evidence to authorize conviction", did not violate due process and was constitutionally permissible. Thus, there was a rational connection between the Defendant's presence and the operation of the still to warrant a conviction by use of the statutory inference.

A later decision by the Court recognizing the validity of the "test", aforementioned, is *United States* v *Romano,* 382 U.S. 136, (1965). The presumption under attack here was identical to that in *Gainey, supra,* except that it authorized the jury to infer from the Defendant's *presence* at an illegal still that he had *possession, custody* or *control* of the still. This presumption was held invalid. While stating that the result in *Gainey, supra,* was entirely justified because "presence at an operating still is sufficient evidence to prove the charge 'of carrying on a business' because anyone present at the site is very probably connected with the illegal enterprise", the Court concluded:

> "Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, the connection is too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is arbitrary.' *Tot* v *United States,* 329 U.S. 463"

This language by the Court illustrates that it is not competent for Congress to create, as a rule governing the procedure of the Courts, a statutory inference of guilt, where the inference is so *strained* as not to have a reasonable relation to the recognized circumstances of life. The case of *Bozza* v *United States,* 330 U.S. 160, (1947), is consistent with this theory and required that the testimony adduced at trial must point directly to the conduct within the narrow margins which the statute alone defines.

When this requirement is not met, the inference is too broad and violates due process for the reason that the Government will not be proving its case beyond a reasonable doubt.

The foregoing cases were responsible for the evolution of the "rational connection" test to *Leary* v *United States, supra.* In *Leary,* the Court reversed the Petitioner's conviction due to the fact that Title 21, United States Code, Section 176(a) denied the Petitioner's due process of law as guaranteed by the Constitution. Section 176(a) had authorized the jury at the trial of the prosecution for knowingly transporting and concealing marijuana which had been illegally brought into the United States, to infer from the defendant's possession that he knew of the unlawful importation. The Court expressly adopted the test set forth in *Tot; Romano,* and *Gainey,* and further elicited:

> "The upshoot of *Tot, Gainey,* and *Romano* is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence, unconstitutional, *unless* it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 23 L. Ed. 2d at 82.

With regard to the "knowledge" presumption, the Court held that *Tot* and *Romano* require the statute creating the inference to be taken at face value and the question must be asked as to whether it permits conviction upon insufficient proof of "knowledge", rather than inquire whether Congress might have made possession itself a crime.

This test requires this Court to determine Congressional intent reflected by Title 18, United States Code, Section 2314 violations, and whether there is direct or circumstantial data regarding the beliefs of persons in possession of securities. To do otherwise would relieve the

Government of the burden of having to adduce such evidence at the trial of the cause. This requires the Court in a Section 2314 prosecution to consider in detail whether the available evidence supports the conclusion that the "knowledge" requirement of Section 2314 presumption is constitutional under the standard established in *Tot* and adhered to in *Gainey* and *Romano*. That is, whether it can be said with substantial assurance that one in possession of a security is more likely than not to know that the security he possesses was stolen. The nature and circumstances of the possession must satisfy the presumed facts, otherwise the presumption is not available. In this case there was an inquiry by the Appellants from all Federal authorities who were duty bound to have the records which would demonstrate the valid or illegal status of the Treasury Bill prior to the foreign transportation. This fact refutes a presumption of knowledge of the stolen or fraudulent status of the bill. (It is pointed out that this vital test is in substantially the same wording as used in *Leary*, at page 87.)

As pointed out in *Leary*, the Court stated essentialy that it could not be possibly determinable that every marijuana smoker knew that the marijuana had been imported or illegally brought into the United States.

In *Turner* v *United States*, 396 U.S. 398, (1970), this reasoning, as to the assembling data, was used and an inference as to heroin being imported was held constitutional due to the fact that about ninety (90%) per cent of all heroin is imported and most users know this. The inference was, however, held unconstitutional to cocaine which does not bear the same insurmountable statistics.

(c)

The third issue presented to the District Court and the Court of Appeals was that the Trial Court erred in its instruction to the jury on the inference of knowledge from possession of stolen property, thereby creating an irrebutable presumption against your petitioners.

In this case, presumptions, inferences and fact are in conflict. The observations of Professor Thayer in his *Preliminary Treatise on Evidence*, 1898, and Professor Morgan's writings and observations published in the Harvard Law Review, 47 Harvard Law Review 59, 12 Washington Law Review 255, appear to be appropriate under the circumstances, to-wit:

> "Every mind of sufficient intelligence to appreciate the difficulties of the subject matter has approached the subject of presumption with a sense of hopelessness and has left it with a feeling of despair."

The basis for the contention of the Petitioners that the Court was in error in charging the jury on the inference in the instant case is based on the following facts and authorities. The presumptions which come into play herein, and which have created this embroglio which would not have occurred had the Court properly acted on the objections of the Appellants to the instructions, are as follows:

1. The presumption of innocence;

2. The presumption of the regularity of official acts and an official acting in a particular capacity will fully and dutifully perform the duties assigned to his position;

3. That any criminal process which creates an irrebutable presumption against the Defendant is void, *Tot* v. *United States, supra.*

The instruction which the Court gave and the refusal of the Court, over timely request and specific objections to the instructions, to instruct the jury was error under the circumstances of this case. The refusal to instruct that actual knowledge must be proven by the Government to sustain the burden herein created a factual and legal result which deprived Petitioners of a fair and impartial trial. The Court substituted inferred knowledge for actual knowledge when all of the basis for inferred knowledge had either been negated by the Government or the Petitioners. Therefore, the standard of proof which allowed the jury to return a finding of guilty based on an inference which was without factual foundation voids this conviction. The importance of proper instructions from the Court to the jury has been reviewed recently by the Supreme Court of the United States in several landmark decisions, one being *Bruton* v *United States,* 391 U.S. 123, (1968). The Court of Appeals for the Eighth Circuit in considered comparable facts and circumstances in the case of *Ezzard* v *United States,* 7 F.2d 808, (1925), holding that presumptions in criminal cases cannot be given greater weight than in civil cases that the law attaches slight consideration to presumptions in the face of credible testimony leading to a contrary conclusion and the issues should be decided on testimony and not presumptions. The Court further held that Federal statutes creating presumptions making possession presumptive evidence of a violation was not intended to make criminal innocent possession, and likewise was not intended to create a procedure which allowed the prosecution to gain a conviction without proving guilt beyond a reasonable doubt.

The Record in this case reflects, in the conference between the Court and counsel prior to the Court instructing the jury, that the Court would instruct on actual

knowledge provided the law required. Petitioners maintained under the circumstances of this case the law did so require due to the fact that all of the evidence in this case negotiated the possibility or the probability that Petitioners had knowledge of the stolen or fraudulent character and status of the security due to the fact that the authorities who were charged with the responsibility of maintaining records of such transactions had assured the Petitioners that the security was not in fact stolen. Therefore, the fact that they discovered for the first time in Mexico that the security was stolen does not in any way prove that they knew that the security had been stolen when it was transported from Detroit to Mexico. The discovery of the stolen character of the security in Mexico does not in any way revert back to establish *ab initio*, criminal responsibility and knowledge in the Petitioners three days prior thereto. The conduct of the Petitioners as developed by the evidence demonstrates that they used their own names; they did not disguise themselves, their intentions, the reason for their trip to Mexico, that they pursued the regular and ordinary channels in attempting to negotiate this security, demonstrates innocence, not guilt. Further considering the good character evidence introduced by Petitioner Markowitz, together with the extremely ambiguous, uncertain, contradictory and admitted perjurious statements of witness Cardenas, all such facts tend to destroy any inference or presumption of wrong-doing on the part of these Petitioners, and such facts constitute a badge of fraud, deceit and criminality on the Government's only witness, Cardenas, and not on the Petitioners. However, it should be noted that even Cardenas never testified that the Petitioners knew the security had been stolen, and further, Petitioners told Cardenas, according to Cardenas, that the security had been checked by the Federal Reserve.

If the basis for the Court's instructions herein is the testimony of Cardenas, then the Court should have given appropriate consideration to the statements made by Cardenas to the Federal authorities that he, Cardenas, had checked the security in Detroit prior to the trip to Mexico, as well as checking the security in Mexico, without discovering that it was a stolen security. Regardless of whether or not Cardenas was credible is not dispositive of this case nor the instructions for the reason that the testimony of Cardenas did not support the instructions which the Court gave.

In a consideration of conflicting presumptions can it be said that the reliance by Petitioners upon the standards said that the reliance by the Petitioners upon the statements made by the authorities with the Federal Reserve and the F.D.I.C. that the security in question was good, require them to make further inquiry to relieve themselves of the presumption of knowledge of the very fact which the Government authorities refuted? If the answer to the foregoing is in the affirmative then the constitutional prohibition which has heretofore precluded the shifting of the burden of proof to a Defendant in a criminal proceeding on elements of the offense has now been discarded. There is no constiutional procedure which would allow a conviction to stand under the facts of this case. The Court by its instructions and by allowing the jury to utilize an inference to overcome direct proof has destroyed the presumption of innocence and has created an irreconcilable conflict in the law.

7. CONCLUSION

WHEREFORE, by reason of the foregoing premises, petitioners pray that this Court issue a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and hear this case on the merits.

Respectfully submitted,

FREDERICK B. BELLAMY
Attorney for Petitioners
26600 Telegraph Road
Southfield, Michigan 48076
355-0022

NEIL H. FINK
Of Counsel
3300 Guardian Building
Detroit, Michigan 48226
962-7070

8. APPENDICES

—A—

NOTICE OF APPEAL

Notice is hereby given that Marvin Mulligan and Melvin Markowitz, the above-named defendants, hereby appeal to the United States Court of Appeals for the Sixth Circuit from their conviction of March 31, 1971, denial of their Motion for Arrest of Judgment, or in the alternative, for a New Trial entered on June 19, 1972 and sentence imposed and entered June 19, 1972.

/s/ Neil H. Fink
Attorney for Defendant Mulligan
3300 Guardian Building
Detroit, Michigan 48226
962-7070

/s/ Clyde W. Woody
Attorney for Defendant Markowitz
918 Houston First Savings Building
Houston, Texas 77002
(713) 222-9225

Dated: June 21, 1972.

—B—

ORDER

(U. S. Court of Appeals—Sixth Circuit)

(Filed February 15, 1973)

Before: Edwards and Peck, Circuit Judges, and Wilson, District Judge.*

This cause having come on to be considered on the record on appeal and on the briefs and oral arguments of counsel for the parties, and the Court being fully advised in the premises having concluded that no error prejudicial to the rights of the defendants-appellants occurred in the proceedings in the District Court,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

Entered by Order of the Court

/s/ James A. Higgins,
Clerk

* Honorable Frank W. Wilson, Chief Judge of the United States District Court for the Eastern District of Tennessee, sitting by designation.

—C—

ORDER

(U. S. Court of Appeals—Sixth Circuit)

(Filed April 18, 1973)

Before: Edwards and Peck, Circuit Judges, and Wilson, District Judge.

Appellants having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

IT IS ORDERED that the petition for rehearing be, and it is, hereby denied.

Entered by Order of the Court

/s/ James A. Higgins,
Clerk

—D—

DEFENDANTS' PROPOSED INSTRUCTIONS TO THE JURY

(U. S. District Court—Eastern District of Michigan—Southern Division)

Now come the defendants herein, by and through their attorneys of record, Clyde W. Woody and Neil H. Fink, and after the close of the evidence and prior to the argument and submission of the case to the jury request the Court to charge as follows:

REQUESTED CHARGE NO. 1

The defendants are charged with the crime of transporting stolen property in foreign commerce. To convict the defendants of this crime the government must prove beyond a reasonable doubt each of the following essential elements of the crime:

1) That the property in question was stolen, converted or obtained by fraud by someone;

2) That the defendants transported it, or caused it to be transported, in foreign commerce;

3) That at the time the defendants transported it, or caused it to be transported in foreign commerce, they had actual knowledge that it was stolen, converted, or obtained by fraud; and

4) That the property was of the amount or value of Five Thousand ($5,000.00) Dollars or more.

REQUESTED CHARGE NO. 2

Members of the jury, the term 'actual knowledge' as used in defining this offense is an essential element of the offense charged. You may not find the defendants, or either of them, guilty unless you find beyond a reasonable doubt that they knew at the time the treasury bill was alleged to have been transported in commerce that it was in fact stolen.

Reisman v United States, 409 F2d 789 (1969)
Dewitt & Blackmar, Vol. I, Section 16.09

REQUESTED INSTRUCTION NO. 3

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate"—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

A reasonable doubt is a fair doubt, based upon reason and common sense, and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is never to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.

The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

Mathes and Devitt, Federal Jury Practice and Instructions, Civil and Criminal, Section 8.01.

REQUESTED INSTRUCTION NO. 4

An indictment-information is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence—such as the testimony of an eyewitness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Mathes and Devitt, Federal Jury Practice and In-Instructions, Civil and Criminal, Section 8.02.

REQUESTED INSTRUCTION NO. 5

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibiilty, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Mathes and Devitt, Federal Jury Practice and Instructions, Civil and Criminal Section 9.05.

REQUESTED INSTRUCTION NO. 6

There are twelve of you Jurors, and each of you has an individual responsibility equal to that of each and every other Juror in the case. You are to take this tesitmony and harmonize it; it is your duty to harmonize it, if possible, with the innocence of the accused, because, under our law, it is the duty of Jurors in every criminal case to enter upon the trial of the case with the presumption of innocence, and harmonize all the testimony in the case, if possible, in accordance with the presumption that he is innocent.

Gillespie's Criminal Law and Procedure, Form 252; People v Swift, 172 Mich. 473.

REQUESTED INSTRUCTION NO. 7

Ladies and Gentlemen of the jury, Mr. Marvin Mulligan has not taken the stand in his own defense as a witness, which is his constitutional right to observe. I instruct you that under your oath as jurors you may not and cannot in any way discuss this declination to take the stand in your deliberation, and that further, you may not and cannot in any way infer guilt by reason of his failure to take the stand. The reason for this is that our law recognizes that counsel for an entirely innocent person, for a multitude of reasons, might see fit not to place his client on the stand to testify in his own behalf.

Griffin v California, 85 S Ct 1225 (1965)

REQUESTED INSTRUCTION NO. 8

Defendant Markowitz has offered evidence of his own good character and reputation, and where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case.

Evidence that a defendant's reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, has not been discussed; or that those traits of the defendant's character have not been questioned, may be sufficient to warrant an inference of good reputation as to those traits of character.

Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commis-

sion of the crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Devitt & Blackmar, Vol. 1, § 11.30.

REQUESTED INSTRUCTION NO. 9

The crime charged in this case is a serious crime which requires proof of specific intent before the defendants can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendants knowingly did an act which the law forbids, (or knowingly failed to do an act which the law requires,) purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

An act or a failure to act is "knowingly" done, if done voluntarily and intentionally, and not because of mistake

Devitt and Blackmar, Vol. 1, § 13.03

or accident or other innocent reason.

REQUESTED INSTRUCTION NO. 10

Members of the jury, defendant Markowitz, by his testimony, maintains that at any time he had the treasury bill in his possession he was acting in good faith. He further claims, in support of this, that his inquiry of Mr. Joiner is a predicate for his good faith belief. If you believe, or have a reasonable doubt, as to whether or not the defendant was acting in good faith, then that is inconsistent with the proposition advanced by the government that defendant Markowitz acted with knowledge that the treasury bill was stolen, and, therefore, you should find defendant not guilty. Now, I caution you, members of the jury, that the burden is not on the defendants to prove their good faith; they have no burden to prove anything; the burden remains with the government to prove bad faith beyond all reasonable doubt.

Sparrow v United States, 402 F2d 826
Devitt & Blackmar, Vol. 1, § 16.09

Respectfully submitted,

/s/ Clyde W. Woody
/s/ Neil H. Fink
Attorneys for Defendants
3300 Guardian Building
Detroit, Michigan 48226
962-7070

Dated: March 29, 1972.

—E—

PETITION FOR REHEARING AND APPENDICES

(U. S. Court of Appeals—Sixth Circuit)

(Filed.....)

Now come Marvin Mulligan and Melvin Markowitz, defendants-appellants herein, by and through their respective attorneys Neil H. Fink and Clyde W. Woody, and petition this Honorable Court for a rehearing in the above-captioned case for the following reasons:

1. That the decision affirming appelants' convictions in the above-captioned cause was reached and filed on February 15, 1973.

2. That the order of this Court (attached hereto as Appendix I) was on the sole ground that "no prejudicial error occurred to the rights of defendants" at trial in the District Court.

3. That both at trial and on appeal, appellants each presented three narrowly drawn errors which occurred in the Trial Court.

4. That these issues dealt with

   a) the fact that the Trial Court, in the face of repeated requests by appellants, failed to properly instruct the jury on the jury's duty to determine guilt beyond a reasonable doubt [*In Re Winship,* 397 US 357 (1970)], and further that the Trial Court affirmatively misdefined the concept of reasonable doubt in its charge to the jury [*Holland* v *United States,* 348 US 121 (1954)], (See Appendix II).

b) the paucity of proof at trial relevant to the determination of appellants' knowledge that the Treasury Bill they were alleged to have possessed was in fact stolen, knowledge being an essential element of the offense of knowingly having transported a stolen Treasury Bill in foreign commerce, knowing the same to have been stolen. 18 USC 2314. (The Indictment is attached hereto as Appendix III)

c) the error in the instructions to the jury concerning the inference of knowledge from possession of stolen property, which error created an irrebuttable presumption against appellants. (See Appendix IV)

5. That, with all respect due to this Honorable Court, appellants contend that the important issues raised by them deserve *at least* discussion by this Court, as opposed to a mere form affirmance of their convictions, which order does not refer to any fact nor any issue deemed important in this case.

6. That in light of *In Re Winship, supra,* and *Holland* v *United States, supra,* this Court must face the challenge thrown to it by the Trial Court and determine the law of the circuit with respect to a criminally accused's due process rights to be convicted only by proof beyond a reasonable doubt. Further, this Court must face the issue of whether those due process rights are protected when a Trial Court affirmatively misdefines the concept of reasonable doubt to a jury about to begin its deliberations.

WHEREFORE, defendants-appellants pray that this Honorable Court grant a rehearing in this matter, or, in the alternative, that this Court issue an Opinion explain-

ing the affirmance of appellants' convictions in order that the law on the issues raised may be clarified and also to show why appellants' convictions are erroneous, if at all.

Respectfully submitted,

/s/ Neil H. Fink
Attorney for Appellant Mulligan
3300 Guardian Building
Detroit, Michigan 48226
313/762-7070

/s/ Clyde W. Woody
Attorney for Appellant Markowitz
918 Houston First Savings
Building
Houston, Texas 77002
713/222-9225

February 27, 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1553

MARVIN MULLIGAN AND
MELVIN MARKOWITZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issues are whether the trial court instructions to the jury on "reasonable doubt" and on the inferences that may be drawn from a finding of possession of recently stolen property were proper, and whether the evidence supported a finding that petitioners knew that the property they possessed was stolen.

Following a jury trial in the United States District Court for the District of Michigan, petitioners Mulligan and Markowitz were each convicted of having transported and caused to be transported in foreign commerce securities valued at $5000 or more, known to have been stolen, in violation of 18 U.S.C. 2314. On June 19, 1972, petitioners were each sentenced to five years' imprisonment. The court of appeals affirmed, *per curiam* (Pet. App. B).

The charge at issue here arose out of the theft in October, 1969, of United States Treasury Certificates totalling $30,000,000 from Morgan Guaranty Trust Company in New York City. Among the stolen securities was a $100,000 treasury bill, serial number 1017056A, bearing an April 9, 1970 maturity date (Tr. 17, 28-31).

In November 1969, Xavier Cardenas met petitioner Markowitz in the office of Sidney Solomon in Southfield, Michigan, a Detroit suburb (Tr. 137-138, 201). Thereafter, in late January 1970, someone identifying himself only as "Marvin" telephoned Cardenas from New York, asking if he had friends in Mexico and if he could dispose of some documents there (Tr. 138-139, 142-143, 146). Within a few days petitioner Markowitz telephoned Cardenas and asked to meet with him to discuss a possible business venture (Tr. 146-147, 202). At the meeting petitioner Markowitz related that he had friends who wanted to dispose of some documents in Mexico and might also be willing to invest the money in that country (Tr. 147-149). He asserted that his friends wanted to avoid paying the tax involved in a sale of the documents in the United States (Tr. 149). When Cardenas expressed interest, Markowitz told Cardenas that he would be contacted again within a few days (Tr. 149). At a second meeting, petitioner Markowitz disclosed that the documents involved were United States Treasury bills (Tr. 150, 213) and on the following day he provided Cardenas with a copy of a $100,000 treasury bill, serial number 1017056A, and guaranteed that Cardenas and his Mexican friends would each make $5000 on the sale of this bill in Mexico (Tr. 151, 212-214).

After this meeting, Cardenas agreed that as soon as he could leave, he would travel to Mexico City with petitioner Markowitz and a person Markowitz referred

to as "Frank Smith" (Tr. 155-156, 157-158, 260). On February 17, 1970, they flew from Detroit to Mexico City (Tr. 157-158, 490-492). The third person who accompanied Markowitz was petitioner Mulligan (Tr. 158). During the flight petitioner Mulligan removed the original of Treasury bill 1017056A from his coat pocket and gave it to Markowitz who showed it to Cardenas (Tr. 160). That night in their hotel room in Mexico City petitioners again brought out the treasury bill and showed it to Cardenas and his friends (Tr. 161-163, 270-273, 287-288, 858-862, 884-886), representing to Cardenas' friends that they had 300 more of these bills (Tr. 863, 906).

The next day Cardenas and two friends visited several banks seeking to cash the treasury bill (Tr. 164-165, 291, 328). After learning that obtaining cash for the security—the only method of disposing of it acceptable to petitioners—would require several days, they reported back to petitioners at the hotel; petitioners became enraged at the news (Tr. 165-166, 329). Petitioner Markowitz agreed to give Cardenas and his friends one more day, warning that, if they failed to succeed in cashing the bill, "we are going to the Bahamas" and "to hell with you" (Tr. 166-167). The next morning Cardenas, his friend, Jose Cueto Pineda, and Manuel Damiean went to the Banco del Atlantico. There Damiean introduced Cardenas to Roberto Hernandez, a stockbroker who believed that he could help in cashing the treasury bill (Tr. 75-80, 167-171, 867). Hernandez' attempts to cash the bill disclosed that it was a stolen security (Tr. 123-124, 126-129). This information was relayed to Cardenas and Cueto and the treasury bill was turned over to officials of the American Embassy in Mexico City (Tr. 86-87, 172-173, 461-462, 870,

895-896). Petitioners were then arrested by Mexican police (Tr. 471, 483).[1]

1. Petitioner claims here, as below, that the trial court erred in instructing the jury as to what constituted "reasonable doubt" in the context of an instruction that the government must prove its case "beyond a reasonable doubt" (App. 52).[2] The court charged (App. 52):

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[1] Around the time of the meetings with Cardenas in the middle of February 1970, petitioner Markowitz attempted to cash an unmatured $100,000 treasury bill, serial number unknown, at the National Bank of Southfield, Michigan (Tr. 379-380). Since the Southfield bank could not provide such a large amount of cash, bank manager Stewart Joiner telephoned Nicholas Anastasi in the investment department of the City National Bank of Detroit (Tr. 380). While Joiner waited, Anastasi telephoned the Federal Reserve Bank to verify the authenticity of the bill (Tr. 380, 391, 401-402, 407, 417-418). After checking a list of the securities that had disappeared from Morgan Guaranty Trust Company, Federal Reserve employee Harry Johnston reported to Anastasi that the serial number inquired about did not appear on the list. Anastasi relayed this information to Joiner (Tr. 381, 408, 417-425). The list he consulted contained serial number 1017056A which Johnston testified definitely was not the number that Anastasi gave him over the phone (Tr. 418, 433-435).

Following his conversation with Anastasi, Joiner instructed Markowitz to cash the treasury bill downtown at City National Bank (Tr. 381, 391, 408). About an hour later Markowitz returned and induced Joiner to accompany him downtown to the bank in an automobile driven by petitioner Mulligan (Tr. 381-383). Joiner, after again conferring at the bank with Anastasi, could have given Markowitz a cashier's check for the treasury bill (Tr. 384, 387, 401, 403). However, he decided not to make this offer, because petitioner Markowitz had stated unequivocally that only cash would be acceptable, and, in Joiner's experienced judgment, the circumstances "didn't seem right" (Tr. 386-387, 396-397).

[2] "App." refers to petitioners' appendix in the court of appeals.

> Reasonable doubt is a doubt founded in reason arising from the evidence. Not a mere hesitation of the mind to pronounce guilt because of the punishment that may follow. Not a mere capricious doubt or a hesitancy of the mind to say this man did so-and-so, but it must be a doubt founded in reason and arising from the evidence.

The court also instructed the jury that the burden of proving defendants guilty beyond a reasonable doubt rests with the prosecution throughout trial and never shifts to the defense (App. 53) and if two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, the jury should adopt the one of innocence (App. 52).

The trial court's explanation of reasonable doubt as "doubt founded in reason arising from the evidence" was proper (App. 52). The court was not required, as petitioners requested at trial (App. 34) and contend here, to instruct that such a doubt may arise from a lack of evidence. Indeed, such a specific requirement is not present in the model instruction of the authority relied upon by petitioners at trial (App. 34, see also Pet. 50), which is set forth in Devitt and Blackmar, *Federal Jury Practice and Instructions,* §11.01 and reproduced at Pet. 18. As noted in *Ashe* v. *United States,* 288 F. 2d 725, 730 (C.A. 6):

> From hearing [the] entire charge relating to the government's burden to prove all of the essential elements of the offense charged by direct or circumstantial evidence, beyond a reasonable doubt, the jury could not fail to understand that a reasonable doubt could arise from a "want of evidence" as well as from the positive evidence.* * *

See also *United States* v. *Meisch*, 370 F. 2d 768, 774 (C.A. 3); *United States* v. *Caruso*, 358 F. 2d 184, 186-187 (C.A. 2), certiorari denied, 385 U.S. 862; *Laughlin* v. *United States*, 385 F. 2d 287, 294 (C.A.D.C.), certiorari denied, 390 U.S. 1003. Here, too, on the basis of the charge as a whole, it is inconceivable that the jury in this case failed to understand that a reasonable doubt could result from a lack of evidence.[3]

2. Petitioners also contend that the prosecution failed to prove their knowledge of the stolen character of the treasury bill. As noted above, the evidence showed that petitioner Markowitz telephoned Cardenas, whom he had met only once previously, to seek his help in selling "some documents" down in Mexico (Tr. 147-149). Only after Cardenas and Markowitz had met twice did Markowitz disclose that these documents were United States Treasury certificates (Tr. 150, 213). Although the only reason Markowitz gave Cardenas for selling the securities in another country was to avoid taxes, Cardenas and his friends were guaranteed $10,000 if they succeeded in selling a single $100,000 treasury bill (Tr. 149-151). Petitioners boasted that they had 300 treasury bills like the one they had given Cardenas to sell (Tr. 863, 906). The Morgan Guaranty theft involved $30,000,000 in stolen securities. Cardenas was specifically told that he could only exchange the security

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[3] *United States* v. *Rinaldi*, 301 F. 2d 576 (C.A. 2), and *Laughlin* v. *United States*, 385 F. 2d 287 (C.A.D.C.), certiorari denied, 390 U.S. 1003, upheld convictions where the trial court failed to instruct that a reasonable doubt could result from a lack of evidence. Petitioners' apparent contention that the courts would have reversed if defense counsel at trial had requested such an instruction and objected to its omission is simply not supported by the language in these decisions. See 301 F. 2d at 578 and 385 F. 2d at 294-295.

for cash and petitioners did not participate in any of the negotiations for the security's sale (Tr. 164-165, 166, 167-171). When Cardenas indicated that there would be a delay in obtaining cash, petitioners exhibited anger and threatened to take the certificate to another foreign country for sale. From these facts the jury could reasonably infer that petitioners knew of the treasury bill's stolen character.

Nor does the fact that Markowitz tried to cash a treasury bill in a Detroit bank prior to the trip to Mexico City show that he lacked knowledge that the treasury bill involved here was stolen.[4] Apart from the fact that they were apparently separate bills, his insistence on cash for the other bill casts doubt on his innocent possession of that bill. In any event, the determination whether the defendant had knowledge that property in his possession was stolen was for the jury. *Pearson* v. *United States,* 192 F 2d 681, 689 (C.A. 6); *Anderson* v. *United States,* 406 F. 2d 529, 532-533, 535 (C.A. 8); *United States* v. *Nadler,* 353 F. 2d 570, 573 (C.A. 2).

3. Finally, petitioners challenge the trial court's instruction that "possession of property recently stolen, if not satisfactorily explained" was a circumstance from which the jury might, but was not required, to infer that the possessor knew the property had been stolen. The instruction follows closely the standard charge recently approved by this Court in *Barnes* v. *United States,* No. 72-5443, decided June 18, 1973.

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[4] Petitioners assert that they inquired of federal authorities about the status of the treasury bill (Pet. 41). The record discloses no such inquiry. Petitioner Markowitz testified that he did not remember even soliciting such an inquiry (Tr. 661).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.